

1 SUNNY S. HUO (State Bar No. 181071)  
ssh@severson.com  
2 KALAMA M. LUI-KWAN (State Bar No. 242121)  
kml@severson.com  
3 SEVERSON & WERSON  
A Professional Corporation  
4 One Embarcadero Center, Suite 2600  
San Francisco, CA 94111  
5 Telephone: (415) 398-3344  
Facsimile: (415) 956-0439

6 Attorneys for Defendants  
7 Countrywide Home Loans, Inc. (d/b/a  
America's Wholesale Lender), BAC  
8 Home Loans Servicing, LP (f/k/a Countrywide  
Home Loans Servicing L.P.), ReconTrust  
9 Co., N.A., Bank of America, N.A., and  
Bank of New York Mellon (erroneously  
10 named as Bank of New York)

11  
12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA

14 PETRA MARTINEZ,

15 Plaintiff,

16 v.

17 AMERICA'S WHOLESALE LENDER, *et al.*,

18 Defendants.

Case No.: 09-cv-05630-WHA

**REPLY BRIEF IN SUPPORT  
OF MOTION TO DISMISS**

Date: January 14, 2010  
Time: 8:00 a.m.  
Courtroom: 9, 19th Floor  
Judge: Hon. William H. Alsup

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1 **I. INTRODUCTION**

2 Plaintiff Petra Martinez (“Plaintiff”) filed this suit against defendants Countrywide Home  
3 Loans, Inc. (d/b/a America’s Wholesale Lender), BAC Home Loans Servicing, LP (f/k/a  
4 Countrywide Home Loans Servicing L.P.), ReconTrust Company, N.A., Bank of America, N.A.,  
5 and Bank of New York Mellon (erroneously named as Bank of New York) (“Defendants”) not to  
6 right a wrong but to delay a proper foreclosure and leverage a favorable loan for herself.

7 In her opposition (“Opposition” or “Opp.”) to Defendants’ motion to dismiss (“Motion”),  
8 Plaintiff makes a “universal objection” to the conclusion that she is abusing the judicial process.  
9 (Opp. at 2.) The problem for Plaintiff, however, is that her first amended complaint (“FAC”) and  
10 Opposition both suggest she is using the process only to delay the foreclosure sale. The FAC is  
11 similar to complaints that Plaintiff’s counsel has filed in many other actions in this District since  
12 Fall 2009. Similarly, the Opposition not only fails to address points that Defendants raised in  
13 their Motion, but perhaps more tellingly, tries to refute an argument that Defendants never made.

14 Plaintiff also takes issue with Defendants’ request for dismissal with prejudice. But  
15 Plaintiff has given no indication that she can plead more facts, or that she understands the  
16 pleading standard set by Rules 8 and 9(b). (*See* Opp. at 9 (“The test is whether the facts, as  
17 alleged, support *any* valid claim entitling plaintiffs to relief . . . not necessarily the one intended  
18 by Plaintiff.”) (emphasis in original).) Setting aside her willingness to assert legally defective  
19 claims, Plaintiff has shown a readiness to make truly outrageous arguments to keep her litigation  
20 alive. (*See id.* at 2 (arguing that motion to dismiss “is aimed at an improper and unjust goal of  
21 depriving a citizen of the United States and the State of California from her right to due process  
22 of law”).) Simply put, Plaintiff’s lawsuit has all of the hallmarks of a classic stalling action.

23 There is no reason for this case to remain on the Court’s docket. Defendants therefore  
24 respectfully request that the Court dismiss this action with prejudice.

25 **II. ARGUMENT**

26 **A. Plaintiff Admits That She Has Not Complied With California’s Tender Rule**

27 For four reasons, the Opposition fails to show that Plaintiff has satisfied (or will satisfy)  
28 California’s tender rule.

**1. The Tender Rule Applies When A Trustee's Sale Is Pending**

Without citing any legal authority, Plaintiff argues that the tender rule does not apply in this case because the trustee's sale "hasn't occurred yet." (Opp. at 4.) Plaintiff is wrong.

In California, the tender rule applies even where the challenged sale has not yet occurred. Indeed, courts have consistently held the rule applies in the pre- and post-foreclosure context. *See Alicea v. GE Money Bank*, 2009 WL 2136969, at \*3 (N.D. Cal. July 16, 2009) ("When a debtor is in default of a home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must allege a credible tender of the amount of the secured debt to maintain any cause of action for wrongful foreclosure."); *Pantoja v. Countrywide Home Loans, Inc.*, 640 F.Supp.2d 1177, 1184 (N.D. Cal. 2009) (holding in case where trustee's sale was pending that "Defendants are entitled to a dismissal on the ground that Plaintiff failed to allege that he has met the 'tender rule' requirements"); *Chavez v. Recontrust Co.*, 2008 WL 5210893, at \*6 (E.D. Cal. Dec. 11, 2008) (dismissing request to enjoin sale because the "law is long-established that a trustor or his successor must tender the obligation in full as a prerequisite to challenge the foreclosure sale").

**2. As A Standing Requirement, The Tender Rule Must Be Analyzed At The Start Of Litigation, Not At Its Conclusion**

Plaintiff argues that the Court should suspend the tender rule and instead "condition[] its judgment upon Plaintiff's tendering" of the amount owed on her \$1,500,000.00 debt. Put another way, Plaintiff wants the Court to defer any analysis of Plaintiff's standing until the end of the litigation. This argument is nonsense.

Courts impose the rule as a threshold standing requirement at the outset of litigation because if plaintiffs "could not have redeemed the property" in the first place, then they could not have been harmed by any alleged irregularities in the sale procedure. *FPCI RE-HAB 01 v. E&G Invs., Ltd.*, 207 Cal.App.3d 1018, 1022 (1989). And if plaintiffs were not harmed by any such irregularities, then allowing them to proceed "would be nothing but an idly and expensively futile act[,] wasting the time and resources of defendants and the judicial system. *Alvara v. Aurora Loan Services, Inc.*, 2009 WL 1689640, at \*6 (N.D. Cal. June 16, 2009) (citation omitted). Plaintiff's standing to pursue her claims should thus be decided at the outset of litigation.

**3. Statements Indicating A Desire To Tender Are Not Substitutes For Actual Offers to Tender**

In a half-baked attempt to comply with the tender rule, Plaintiff states that she “wishes to pay the mortgage.” (Opp. at 5.) This proclamation of Plaintiff’s *desire* to “pay the mortgage” is not enough to satisfy the tender rule. As a matter of law, “to challenge the foreclosure sale, plaintiff must indeed allege that the amount due has been tendered.” *Wong v. First Magnus Fin. Corp.*, 2009 WL 2580353, at \*2 (N.D. Cal. Aug. 20, 2009) (citing *U.S. Cold Storage v. Great Western Sav. & Loan Ass’n*, 165 Cal.App.3d 1214, 1222 (1985)); *Pantoja*, 640 F.Supp.2d at 1184. For instance, in *Pantoja*, plaintiff conferred with his lender and submitted an application for a loan-modification. The court held that even these steps were insufficient to comply with the tender rule, explaining that “[t]hese allegations merely inform Defendants that Plaintiff submitted documents requested by Countrywide. Plaintiff’s allegations are devoid of facts to show that a valid and viable tender offer was made.” *Id.* In this case, Plaintiff has done even less, and cannot satisfy the rule by stating only that she “wishes” to pay the mortgage. (Opp. at 5.)

To be clear, there is no room for creativity in compliance with the tender rule—the rule is “strict and strictly applied” by California courts. *Nguyen v. Calhoun*, 105 Cal.App.4th 428, 439 (2003). Because Plaintiff does not (and cannot) allege that she has tendered the full amount owed, she lacks standing to pursue any of her claims as a matter of law. *Id.* (“In other words, with respect to tender, ‘it is a debtor’s responsibility to make an unambiguous tender of the entire amount due or else suffer the consequence that the tender is of no effect.’”) (quoting *Gaffney v. Savings & Loan Assn.*, 200 Cal.App.3d 1154, 1165 (1988)).

**4. Plaintiff Cannot Escape Compliance With The Rule By Making Empty Offers To Tender Or Asking For A Declaration From The Court**

Plaintiff makes the bold statement that neither *Nguyen v. Calhoun* “nor any other case shows that it is appropriate to dismiss a case at the onset where plaintiff is willing to tender upon determination [by] the court of her obligations.” (Opp. at 8.) For three reasons, she is wrong.

First, an offer to tender is an empty offer where a plaintiff has no ability to do so. *Anaya v. Advisors Lending Group*, 2009 WL 2424037, at \*10 (E.D. Cal. Aug. 5, 2009) (“Simply put, if the offeror ‘is without the money necessary to make the offer good and knows it’ the tender is



without legal force or effect.”) (quoting *Karlsen v. American Sav. & Loan Ass’n*, 15 Cal.App.3d 112, 118 (1971)); *see also In re Si-Va Tech., Inc.*, 35 Fed. Appx. 681, 684 (9th Cir. 2002) (“As to the alleged tender of May 6, 1998, it too must fail. An offer of performance is of no effect if not made in good faith with intent and ability to perform. Therefore, ‘insincere’ and ‘evasive’ offers are not effective tenders.”) (citing *Sondel v. Arnold*, 2 Cal.2d 87, 90 (1934)).

Here, Plaintiff’s statement that she is “willing” to tender has no legal effect. (Opp. at 8.) She does not (and cannot) dispute that she failed to make her monthly payments. (RJN, Ex. 2.) Her failure to comply with those payment obligations hollows out any allegation she can make indicating that she will tender the full balance owed. Because “Plaintiff’s inability to make monthly promissory note payments reflects [an] inability to tender amounts owed[,]” she cannot credibly plead that she will tender the full amount. *Anaya*, 2009 WL 2424037, at \*10; *see also Sitanggang v. IndyMacBank, F.S.B.*, 2009 WL 1286484, at \*2 (E.D. Cal. May 6, 2009) (same). She certainly alleges no facts to support the conclusion that she can carry out her wishful statement that she is willing to tender.

Second, Plaintiff cannot escape the rule by claiming that the Court must first determine the amount owed. (Opp. at 8.) A borrower cannot sue a lender and argue that she owes nothing until the lender can prove how much she owes. *See Pantoja*, 640 F.Supp.2d at 1192 (rejecting argument that “there is no way to determine what [plaintiff] owes without an accounting by Defendants” because “Plaintiff does not claim that he is owed anything by Defendants nor is it difficult to calculate what Plaintiff owes Defendants based on the attached Notice of Default”).

Third, a “determination” of the amount owed is unnecessary because Plaintiff knew at every stage of the foreclosure process how much she owed to her lender. The Notice of Default told Plaintiff how much she needed to pay to stop the foreclosure process:

**IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS, IT MAY BE SOLD WITHOUT ANY COURT ACTION,**  
and you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five business days prior to the date set for the sale of your property. No sale date may be set until three months from the date this notice of default may be recorded ( which date of recordation appears on this notice).

This amount is \$79,555.75, as of 01/27/2009 and will increase until your account becomes current.

(RJN, Ex. 2.)



1 Similarly, the Notice of Sale told Plaintiff the amount of the outstanding balance at the  
2 time the notice was prepared:

3 The total amount of the unpaid balance with interest thereon of the obligation secured by the property to be sold plus  
4 reasonable estimated costs, expenses and advances at the time of the initial publication of the Notice of Sale is  
\$1,608,361.83. It is possible that at the time of sale the opening bid may be less than the total indebtedness due.

5 (RJN, Ex. 4.)

6 The answer to Plaintiff's question of how much she needs to tender to have standing is a  
7 simple one: \$1,608,361.83. Because Plaintiff has failed to allege that she can and will tender this  
8 amount, she has no standing to file this suit.

9 **B. Plaintiff's Quiet Title Claim Is Legally Defective**

10 For five separate and independent reasons, the Opposition fails to show that Plaintiff can  
11 state a quiet title claim as a matter of law.

12 **1. Plaintiff Concedes That She Lacks Standing**

13 Plaintiff appears to concede that it would be impossible for her to obtain quiet title without  
14 repaying the money owed on her loan. (Motion at 5; Opp. at 5-7.) Because she has failed to  
15 refute Defendants' showing in this regard, her quiet title claim should be dismissed.

16 **2. The UCC Does Not Apply To Nonjudicial Foreclosures**

17 Plaintiff argues that Defendants are required to offer "evidence as to who owns the note"  
18 before commencing foreclosure proceedings. (Opp. at 7.) For two reasons, she is wrong.

19 First, Plaintiff's contentions on this point are inconsistent. On the one hand, she argues  
20 that Defendants are required to show who "owns the note" (*id.*); but on the other hand, she claims  
21 that she is "not seek[ing] to litigate physical possession of the note" (*id.* at 5). Because Plaintiff's  
22 Opposition is a jumbled mess, it is unclear exactly what she is trying to argue.

23 Second, to the extent Plaintiff is claiming that the promissory note is a negotiable  
24 instrument, and must therefore be enforced by the note holder pursuant to the Uniform  
25 Commercial Code ("UCC"), she is wrong. (*Id.* at 7.) The UCC governs negotiable instruments;  
26 it does not govern nonjudicial foreclosure under deeds of trust.

27 As Defendants explained in the Motion, the rules governing nonjudicial foreclosure of a  
28 deed of trust are set forth in the California Civil Code beginning at Section 2924. (Motion at 6-

7.) California courts have repeatedly held that these Civil Code provisions establish a “comprehensive” and “exclusive” set of regulations for the conduct of non-judicial foreclosures. *Moeller v. Lien*, 25 Cal.App.4th 822, 834 (1994) (“The comprehensive statutory framework established to govern nonjudicial foreclosure sales is intended to be exhaustive.”); *I.E. Assocs. v. Safeco Title Ins. Co.*, 39 Cal.3d 281, 285 (1985) (“The statutory provisions regulating the nonjudicial foreclosure of deeds of trust are contained in sections 2924-2924i. These provisions cover every aspect of exercise of the power of sale contained in a deed of trust.”).

Because the Civil Code provides the “comprehensive” and “exclusive” rules governing nonjudicial foreclosures, the UCC does not play any role in the foreclosure process. *See, e.g., Farahani v. Cal-Western Reconveyance Corp.*, 2009 WL 1309732, at \*2 (N.D. Cal. May 8, 2009) (“Plaintiff’s opposition to the motion to dismiss is based almost entirely on provision of the California Commercial Code. The case law cited by Plaintiff that purportedly applies the Commercial Code to transfer of a deed is inapposite, as those cases do not involve foreclosure of residential property. While Commercial Code § 3301 arguably requires that the foreclosing party have possession of the underlying deed or note, such possession is not required for a non-judicial foreclosure.”); *Smith v. Wachovia*, 2009 WL 1948829, at \*3 (N.D. Cal. July 6, 2009) (“Plaintiff is incorrect that the UCC is the governing law in this matter. . . . The non-judicial foreclosure process is covered exclusively by section 2924 of the California Civil Code.”).<sup>1</sup>

That state and federal courts in California have soundly rejected this theory is not news to Plaintiff’s counsel, Michael Rooney. In another foreclosure-delay lawsuit, Mr. Rooney litigated and lost on this very same point. *Reynoso v. Paul Financial, LLC*, 2009 WL 3833298, at \*4

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<sup>1</sup> *See also Castaneda v. Saxon Mortg. Services, Inc.*, --- F.Supp.2d ----, 2009 WL 4640673, at \*7 (E.D. Cal. Dec. 3, 2009) (rejecting argument that defendants “were not in possession of the Note, and are not beneficiaries, assignees or employees of the entity in possession of the note, and are therefore not ‘person[s] entitled to enforce’ the security interest on the property in accordance with section 3301” because “section 3301 reflects California’s adoption of the Uniform Commercial Code, and does not govern non-judicial foreclosures, which is governed by California Civil Code section 2924”); *Gaitan v. Mortgage Electronic Registration Sys.*, 2009 WL 3244729, at \*10 (C.D. Cal. Oct. 5, 2009) (“Plaintiff’s argument about the ‘holder of the note’ is premised on his interpretation of Cal. Com. Code §§ 3301, 3309. . . . Those statutory provisions reflect California’s adoption of the Uniform Commercial Code, and generally define a ‘Person entitled to enforce’ a ‘lost, destroyed or stolen instrument.’ Non-judicial foreclosure in California is not governed by this statute, but rather by Cal. Civ. Code §§ 2924, *et seq.*”).

(N.D. Cal. Nov. 16, 2009) (quoting *Moeller*, 25 Cal.App.4th at 834). In *Reynoso*, as in this case, Mr. Rooney argued that “the promissory note is a negotiable instrument, and must therefore be enforced by the note holder pursuant to section 3301 of the California Commercial Code.” *Id.* The Honorable Judge Samuel Conti disagreed, explaining that Mr. Rooney’s attempt to import the UCC’s rules into the Civil Code’s framework “must fail” because “[i]t would be inconsistent with the comprehensive and statutory scheme regulating nonjudicial foreclosures to incorporate another unrelated cure provision into statutory nonjudicial foreclosure proceedings.” *Id.* (quoting *Moeller*, 25 Cal.App.4th at 834).

Simply put, the overwhelming weight of authority on this point is clear—the UCC does not apply to nonjudicial foreclosures. Plaintiff’s suggestion that “[t]here is no such law or ruling in existence to support this idea” is therefore disingenuous at best. (Opp. at 6.) Because she cannot show that Defendants are required to produce the note or otherwise comply with the UCC before commencing foreclosure proceedings, Plaintiff’s quiet title claim fails as a matter of law.

### 3. Plaintiff’s “Power Of Sale” Argument Is Contrary To California Law

Plaintiff argues that “there is no chain of title from America’s Wholesale Lender, the original note holder, to Bank of New York Mellon, who purports to be entitled to collect now.” (Opp. at 5.) There are two problems with Plaintiff’s argument.

First, Defendants complied with California law in commencing the foreclosure process. (Motion at 2, 6-8.) Plaintiff makes much to do about MERS purportedly breaking the “chain of title” by “attempt[ing] to substitute [the] trustee despite expressly not having the power to do so” under paragraph 24 of the Deed of Trust. (Opp. at 5.) But as the beneficiary, MERS was allowed to substitute the trustee. Civil Code Section 2934a specifically authorizes the beneficiary to execute a substitution of trustee, even if a deed of trust contains a “contrary provision”:

The trustee under a trust deed upon real property . . . given to secure an obligation to pay money and conferring no other duties upon the trustee than those which are incidental to the exercise of the power of sale therein conferred, *may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by . . . all of the beneficiaries under the trust deed, or their successors in interest, and the substitution shall be effective notwithstanding any contrary provision in any trust deed* executed on or after January 1, 1968 . . .

1 Cal. Civ. Code § 2934a(a)(1) (emphasis added). Thus, although paragraph 24 of the Deed of  
 2 Trust identifies the lender as the party that may appoint a successor trustee, the trustee in this case  
 3 (*i.e.*, MERS) “possessed the power of sale upon default, which it could transfer to a trustee.”  
 4 *Reynoso*, 2009 WL 3833298, at \*2.

5 Second, Plaintiff’s counsel knows full well that this contention is not warranted by  
 6 existing law. As with other arguments in the Opposition, Plaintiff’s counsel has already litigated  
 7 and lost on this same point. In *Reynoso*, for instance, Mr. Rooney argued that “Paul Financial, as  
 8 the lender, was the only party granted the power of sale.” *Reynoso*, 2009 WL 3833298, at \*2.  
 9 Judge Conti explained that Mr. Rooney’s contention “is plainly false” because under California  
 10 law, “[t]he beneficiary is free to make a substitution of the trustee in order to conduct the  
 11 foreclosure sale.” *Id.* at \*2 (citing Cal. Civ. Code §§ 2934a, 2924b(b)(4)). The “power of sale”  
 12 theory that Plaintiff’s counsel offered in *Reynoso* is no different than the “power of sale” theory  
 13 offered in the boilerplate complaint here, and should be rejected.

#### 14 **4. Plaintiff Concedes That She Has Not Been Prejudiced By Any** 15 **Procedural Irregularities**

16 As Defendants explained in the Motion, the FAC does not show how Plaintiff was  
 17 prejudiced (if at all) by their alleged failure to comply with statutory requirements governing  
 18 nonjudicial foreclosures. (Motion at 8-9 (citing *Knapp v. Doherty*, 123 Cal.App.4th 76, 92  
 19 (2004).) The Opposition avoids contesting this point altogether, effectively conceding that  
 20 Plaintiff cannot make that showing. Because she cannot show that she suffered any prejudice as a  
 21 result of the purported errors, her quiet title claim fails as a matter of law. *See Moore v. Chase*  
 22 *Bank*, 2009 WL 961161, at \*4 (N.D. Cal. Apr. 7, 2008) (“Without even an allegation of prejudice,  
 23 the Court will not intervene based on what may be, at most, a technicality.”).

#### 24 **5. Plaintiff Cannot State A Quiet Title Claim Based On Fraud**

25 In the Motion, Defendants explained that the FAC cannot state a quiet title claim based on  
 26 fraud because it does not: (1) challenge any particular representation; (2) explain why any such  
 27 representation was false when made; or (3) identify the speaker of the representation. (Motion at  
 28 9-10.) Despite having forced Defendants to brief the issue by pleading it in her FAC, Plaintiff has

1 not mentioned (or refuted) Defendants' showing in her Opposition. Because she apparently  
2 cannot resolve this pleading defect, her quiet title claim should be dismissed.

3 **C. Plaintiff's RESPA Claim Is Legally Defective**

4 For three reasons, the Opposition does not do enough to save Plaintiff's claim under the  
5 Real Estate Settlement Procedures Act ("RESPA").

6 First, as Defendants explained in the Motion, Plaintiff cannot state a claim based on a  
7 failure to respond to a qualified written request ("QWR") because she does not allege that she  
8 sent a QWR in the first place. (Motion at 10-11.) In her Opposition, Plaintiff suggests that she  
9 did not need to clearly allege that she sent a QWR because, by asserting that Defendants failed to  
10 respond, "an inference may be drawn that such communications were sent." (Opp. at 7.)

11 The problem for Plaintiff, however, is that an "inference" that "communications" were  
12 sent is not enough to show that Defendants had a duty to respond. Even if Plaintiff alleged more  
13 than an inference, her claim would still fail because Plaintiff does not allege that her  
14 "communications" satisfied the statutory requirements of a QWR. *See Walker v. Equity I Lenders*  
15 *Group*, 2009 WL 1364430, at \*4-5 (S.D. Cal. May 14, 2009) (citing 12 U.S.C. § 2605(e)(1) (B))  
16 (a "qualified written request must enable the servicer to identify the name and account of the  
17 borrower, and include a statement of the reasons for the belief of the borrower that the account is  
18 in error"). And even if her "communications" did satisfy the statutory requirements of a QWR, it  
19 is impossible to tell whether Plaintiff mailed them to the address designated by the loan servicer  
20 for the purpose of receiving QWRs. *See Catalan v. RBC Mortg. Co.*, 2008 WL 2741159, at \*5  
21 (N.D. Ill. July 8, 2008) ("If the servicer chooses to establish a separate and exclusive office and  
22 address, borrowers who fail to submit their QWRs to that location do so at their peril."). Thus,  
23 even if Plaintiff alleged that "communications" were sent, her claim would still fail.

24 Second, the Opposition apparently concedes that Plaintiff has not suffered actual damages  
25 as a result of the purported RESPA violation. As Defendants pointed out, Plaintiff's failure to  
26 identify any actual damages is fatal to her RESPA claim. (Motion at 11 (citing *Singh v.*  
27 *Washington Mut. Bank*, 2009 WL 258885, at \*5 (N.D. Cal. Aug. 19, 2009); *Jones v. Select*  
28 *Portfolio Servicing, Inc.*, 2008 WL 1820935, at \*9-10 (E.D. Pa. Apr. 22, 2008)). The Opposition,

1 however, has completely ignored the Motion in this regard, effectively conceding that Plaintiff  
2 does not (and cannot) allege that she suffered actual damages.

3 Third, in her Opposition, Plaintiff asks “why move to dismiss” the RESPA claim without  
4 making “a statute of limitations or lack of standing argument, where dismissal is appropriate . . .  
5 .” (Opp. at 8.) Defendants, however, did make those very arguments. To start with, the Motion  
6 explains that Plaintiff’s RESPA claim is time-barred if the “communications” at issue were sent  
7 before August 3, 2008. (Motion at 11 n.6.) But without factual allegations about the purported  
8 QWR, it is impossible to conclusively determine whether the claim is time-barred. In addition,  
9 Defendants explained in the Motion that Plaintiff lacks standing to pursue any of her claims as a  
10 matter of law because she has not and cannot tender the full balance of her debt. (*Id.* at 3.)

11 Plaintiff’s RESPA claim is therefore legally defective and should be dismissed.

#### 12 **D. Plaintiff’s Unfair Debt Collection Claims Are Legally Defective**

13 According to Plaintiff, “Defendant’s argument regarding Plaintiff’s Unfair Debt  
14 Collection Practices claim is that ‘foreclosure is protected activity.’” (Opp. at 8.) Defendants,  
15 however, did not make any such argument. In the Motion, they explained that: (1) foreclosure  
16 does not constitute “debt collection” under the federal or state fair-debt collection practices act;  
17 and (2) in any event, Plaintiff has not alleged any facts to state a claim. (Motion at 12.)

18 Plaintiff does not address either of these points, most likely because “Plaintiff’s opposition  
19 is, barring some details, the same as the opposition filed by plaintiff’s counsel in a previous case.”  
20 *Onoh v. Citigroup*, 2009 WL 2246207, at \*1 (N.D. Cal. July 27, 2009) (Alsup, J.). Because  
21 Plaintiff has ignored Defendants’ showing in this regard, her claims under the federal and state  
22 Fair Debt Collection Practices Act should be dismissed with prejudice.

#### 23 **E. Plaintiff’s UCL Claim Is Legally Defective**

24 For three reasons, Plaintiff’s arguments are insufficient to save her UCL claim.

25 First, the Opposition string-cites cases and contends that the FAC “provides the alleged  
26 [unlawful, unfair, and fraudulent] practices throughout.” (Opp. at 9-10.) This response, however,  
27 does not address Defendants’ showing that the FAC lacks factual allegations: (1) identifying the  
28



1 challenged advertisements and defendant(s) that published them; and (2) sufficient to state a  
2 fraud-based UCL claim under Rule 9(b). (Motion at 12-13; Opp. at 8-10.)

3 Second, Plaintiff cannot comply with her pleading burden by simply arguing that she  
4 complied with her pleading burden. *Onoh*, 2009 WL 2246207, at \*2 (Alsup, J.) (“It seems as if  
5 plaintiff is emboldened by her oft-stated belief that courts must take all allegations, both legal and  
6 factual, no matter how incredible or argumentative, to be true. This belief is inaccurate.”).

7 Third, the only factual allegation that Plaintiff identifies in support of her UCL claim is a  
8 factual allegation that was not alleged in her UCL claim—*i.e.*, that “Plaintiff was never contacted  
9 pursuant to Cal. Civ. Code § 2923.5 prior to Defendants recording a Notice of Default” in  
10 violation of the UCL. (Opp. at 10.) Plaintiff did not assert a violation of Section 2923.5 in  
11 support of her UCL claim. The UCL claim is based only upon “Defendants’ advertising,” not a  
12 purported violation of the Civil Code. (FAC ¶ 101.)

13 Further, assuming only for the sake of argument that Plaintiff had asserted a UCL claim  
14 based on a Section 2923.5 violation, and assuming (again, only for the sake of argument) that  
15 Plaintiff “was never contacted” (Opp. at 10), her UCL claim would still fail. As Defendants  
16 explained in the Motion, Plaintiff cannot state a claim based on Section 2923.5 because she “has  
17 completely failed to allege in her FAC how she was prejudiced (if at all) by Defendants’  
18 purported failure to comply” with the statute. (Motion at 8-9 (citing *Knapp*, 123 Cal.App.4th at  
19 94; *Lehner v. U.S.*, 285 F.2d 1187, 1190-91 (9th Cir. 1982); *Moore*, 2008 WL 961161, at \*4).  
20 Without “even an allegation of prejudice, the Court will not intervene based on what may be, at  
21 most, a technicality.” *Id.* Plaintiff’s UCL claim should therefore be dismissed with prejudice.

#### 22 **F. Plaintiff’s Declaratory Relief Claim Is Legally Defective**

23 Plaintiff continues to insist that she may assert “declaratory relief” as a standalone claim.  
24 For two reasons, she is wrong.

25 First, the Declaratory Judgment Act (“DJA”), 28 U.S.C. § 2201, *et seq.*, “only permits the  
26 district court to adopt a specific remedy when jurisdiction exists.” *Fiedler v. Clark*, 714 F.2d 77,  
27 79 (9th Cir. 1983). It does not confer upon plaintiffs a basis for asserting an independent cause of  
28 action. As Defendants have pointed out, the DJA “is procedural in nature, and merely offers an



1 additional remedy to litigants.” *Nat’l Union Fire Ins. Co. v. Karp*, 108 F.3d 17, 21 (2d Cir. 1997)  
 2 (*quoted by* Motion at 13); *see also Commercial Union Ins. Co. v. Walbrook Ins. Co.*, 41 F.3d 764,  
 3 775 (1st Cir. 1994) (“A declaratory judgment is not a theory of recovery.”). Plaintiff does not cite  
 4 any authority to the contrary; her only citation is to the DJA itself, which provides for the  
 5 “[c]reation of [a] remedy”, not a new cause of action. As such, her declaratory relief claim fails.

6 Second, the Opposition fails to refute Defendants’ showing that the declaratory relief  
 7 claim is superfluous. (Motion at 14; Opp. at 8.) Indeed, the Opposition does not even address  
 8 Defendants’ showing in this regard. For this additional reason, Plaintiff’s declaratory relief claim  
 9 should be dismissed with prejudice.

10 **G. Plaintiff’s Accounting, Slander Of Title, and Emotional Distress Claims**  
 11 **Should Be Dismissed With Prejudice Because Plaintiff Fails To Refute**  
**Defendants’ Showing That These Claims Are Legally Defective**

12 The Opposition does not do enough to save Plaintiff’s remaining claims for accounting,  
 13 slander of title, and emotional distress. In some respects, it does nothing at all. First, Plaintiff has  
 14 abandoned her “accounting” claim. The Opposition says nothing about Defendants’ showing that  
 15 accounting can only be a valid claim where the defendant owes the plaintiff money—not the other  
 16 way around. (Motion at 15.) As such, the claim should be dismissed with prejudice.

17 Second, Plaintiff argues that her “slander of title” claim should not be dismissed because  
 18 there is no authority “show[ing] that it is appropriate to dismiss a case at the onset where plaintiff  
 19 is willing to tender upon determination of the court of her obligations.” (Opp. at 8.) As discussed  
 20 above, this argument is nonsense. *Supra* § II(A)(4). In addition, this argument fails to address  
 21 the other basis Defendants identified for dismissing the slander of title claim—*i.e.*, recordation of  
 22 a notice of default and a notice of sale are absolutely privileged acts upon which no tort claim of  
 23 any sort, other than malicious prosecution, may be based. (Motion at 14.)

24 Third, Plaintiff argues that her emotional distress (and other) claims should not be  
 25 dismissed because although Defendants are “ask[ing] for dismissal without leave to amend,” their  
 26 “real argument . . . is that they would like to see more facts pled.” (Opp. at 7.) This argument  
 27 fails for two reasons. To start with, Plaintiff does not dispute Defendants’ showing that a creditor  
 28 cannot be liable for emotional distress when “it has merely pursued its own economic interests

1 and asserted its legal rights.” *Trerice v. Blue Cross*, 209 Cal.App.3d 878, 885 (1989) (*cited by*  
 2 Motion at 15); *see also Fletcher v. Western Nat’l Life Ins. Co.*, 10 Cal.App.3d 376, 395 (1970) (a  
 3 defendant is “undoubtedly . . . privileged, in pursuing its own economic interests, to assert its  
 4 legal rights” even if “it is substantially certain that in doing so emotional distress will be caused”).

5 In addition, Plaintiff is wrong—Defendants would not “like to see” Plaintiff allege more  
 6 facts. (Opp. at 7.) Defendants truly are requesting that the Court dismiss the FAC without leave  
 7 to amend. It would be impossible for Plaintiff to plead any facts sufficient to state a claim under  
 8 any theory without running far afoul of her Rule 11 obligations; put another way, allowing  
 9 Plaintiff to proceed further with her litigation would amount to an expensive exercise in futility.  
 10 If Plaintiff has additional facts to support her claims, she should raise them at the January 14,  
 11 2010 hearing on the Motion or be required to submit a motion for leave to amend, explaining  
 12 what additional facts she could assert in another amended complaint.

#### 13 **H. Plaintiffs’ Request For Leave To Amend Should Be Denied**

14 Plaintiff makes much to do about the notice-pleading standard of Rule 8, going so far as to  
 15 devote one-fourth of her Opposition to the topic. (Opp. at 2-4.) But a plaintiff cannot satisfy the  
 16 notice-pleading standard by simply heaving “multiple grounds for relief” onto a piece of paper and  
 17 calling them claims. (*Id.* at 4.)

18 Nor can a plaintiff satisfy the standard by throwing “multiple grounds” at the wall in the  
 19 hope that something will stick. As the Supreme Court recently explained, Rule 8 “demands more  
 20 than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S.Ct.  
 21 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

22 A pleading that offers “labels and conclusions” or “a formulaic recitation of the elements  
 23 of a cause of action will not do.” *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555).  
 24 Nor does a complaint “suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual  
 25 enhancement.’” *Iqbal*, 129 S.Ct. at 1940 (quoting *Twombly*, 550 U.S. at 557). But that is exactly  
 26 what Plaintiff has done.

27 The FAC, with all of its generalized and boilerplate allegations, does not plead any facts  
 28 sufficient to state a claim under any of its 10 theories of liability. Nor can it. It would be

impossible for Plaintiff to plead facts, even under Rule 8's notice-pleading standard, because those facts do not exist. This is not news to Plaintiff—if she had such facts, those facts would have been pled in the FAC and identified in the Opposition.

Leave to amend is not automatic whenever a plaintiff loses a Rule 12 motion. To justify the request to amend, Plaintiff should explain what she can add to the FAC to overcome the fatal obstacles that exist. Otherwise, granting leave to amend amounts to a pure delay in the final disposition of the case, and a concomitant waste of judicial and party resources. *See Sparling v. Daou*, 411 F.3d 1006, 1013 (9th Cir. 2005) (complaint may be dismissed with prejudice if it is clear that it cannot be saved by amendment); *Bloom v. Martin*, 77 F.3d 318, 321 (9th Cir. 1996) (“Dismissing a complaint without leave to amend is appropriate when granting leave would serve no purpose because the acts complained of cannot constitute a claim for relief.”); *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991). (dismissal with prejudice is proper if amendment “would be futile in saving the plaintiff’s case”).

Plaintiff has not identified any facts she could plead in a second amended complaint to overcome the noted defects. Accordingly, her request for leave to amend should be denied.

### III. CONCLUSION

Plaintiff’s FAC is devoid of any merit whatsoever. As a threshold matter, regardless of any additional facts Plaintiff could allege, her action fails because she has no standing to sue. *Supra* § II(A); (Motion at 3-5). Further, even if she had standing, Plaintiff cannot plead facts that could state a claim under any of her 10 theories of liability. *Supra* §§ II(B)-(G); (Motion at 5-16).

The reason Plaintiff is suing without standing, and without properly alleging any facts or claims, is not because she was wronged, but because she is using this litigation as an expensive tool to force Defendants to delay the trustee’s sale and give her a new loan. She is, in other words, using the judicial system to “cause unnecessary delay” and “needlessly increase the cost of litigation[.]” Fed. R. Civ. P. 11(b)(1).

Plaintiff’s counsel must know by now that the claims pled by his client are legally defective. He is no stranger to foreclosure-delay actions, and has litigated and lost on the same theories that his client is pursuing here. *See Reynoso*, 2009 WL 3833298, at \*4 (“Attorney for

1 Plaintiff is warned that dismissal without prejudice is, in this case, by no means an invitation to  
 2 replead certain causes of action. Plaintiff's prior submission of a redundant, poorly-organized  
 3 Complaint that pleads twenty-four causes of action borders on vexatious.").

4 Perhaps recognizing that the claims are untenable, he has littered his client's FAC and  
 5 Opposition with hyperbole, hoping the Court will be swayed more by rhetoric than reason. For  
 6 instance, Plaintiff suggests (repeatedly) that Defendants violated her rights under the Fourteenth  
 7 Amendment by filing a motion to dismiss. (*See* Opp. at 2 ("Plaintiff hereby makes a universal  
 8 objection to each and every argument of the Defendants [*sic*] motion, as well as the motion as a  
 9 whole, on the basis that this motion . . . is aimed at an improper and unjust goal of depriving a  
 10 citizen of the United States and the State of California from her right to due process of law."); *id.*  
 11 at 5 ("Plaintiff has asked the court for a determination of her rights and responsibilities . . . so that  
 12 due process ensues."); *id.* at 8 (motion to dismiss is "an inappropriate and inequitable request  
 13 aimed at depriving Plaintiff of her rights as a citizen of the United States"). Of course, the notion  
 14 that Defendants violated Plaintiff's due process rights by filing a Rule 12(b)(6) challenge is  
 15 absurd, but in the absence of legitimate claims, absurdity is all she has to stand on.

16 For these reasons, and as set forth in their opening papers, Defendants respectfully request  
 17 that the Court dismiss Plaintiff's FAC without leave to amend.

18 Alternatively, because the Opposition suggests that Plaintiff has no facts or legitimate  
 19 claims to plead, Defendants respectfully request that Plaintiff be required to explain what (if  
 20 anything) she would allege in an amended complaint either at the January 14, 2010 hearing or in a  
 21 separately noticed motion for leave to amend.

22 DATED: December 31, 2009

Respectfully submitted,

23 SEVERSON & WERSON  
 24 A Professional Corporation

25 By: /s/ Kalama M. Lui-Kwan  
 Kalama M. Lui-Kwan

26 Attorneys for Defendants Countrywide Home Loans,  
 27 Inc. (d/b/a America's Wholesale Lender), BAC  
 Home Loans Servicing, LP (f/k/a Countrywide  
 Home Loans Servicing L.P.), ReconTrust Co., N.A.,  
 28 Bank of America, N.A., and Bank of New York  
 Mellon (erroneously named as Bank of New York)